No. 91-631

Supreme Court, U.S.
FILED
OCT 15 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT CASELLA, et al.,

Petitioners,

vs.

THE CITY OF MORGAN HILL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?

2. Is there a violation of substantive due process under local rent controls for mobilehome parks, which do not provide for vacancy decontrol, where the effect of the ordinance is to merely transfer the value of the right to occupy at a reduced rate from the parkowner to the departing tenant, and in no way protects the present tenants in their

tenancy from rent increases or decreases, and increases the cost to incoming tenants by the amount of the "premium" paid by said tenant to the departing tenant for the right to occupy at a reduced rate?

3. Since the federal right or claim does not ripen until the state has denied just compensation, did the federal claim even exist at the time the state courts purported to dispose of it?

LIST OF PARTIES

The caption of the case contains the names of all parties to the proceedings in the state court.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
INDEX TO APPEAL	v
TABLE OF AUTHORITIES	
OPINIONS BELOW	2
JURISDICTION	4
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	5
Fifth Amendment	5
California Constitution	5
Morgan Hill Ordinance	6
California Statutes	7
STATEMENT OF CASE	8
PROCEDURAL BACKGROUND AND HOW THE FEDERAL QUESTIONS AROSE	9
The Complaint	9
The Demurrer	10
Plaintiffs' Opposition	11
The Ruling on Demurrer	13
The Appeal	13

THE STATE COURT OF APPEALS DECISION, THAT THE FORCED TRANSFER OF THE "PREMIUM VALUE" FROM LANDLORD TO TENANT, WHICH PREMIUM REPRESENTS THE RIGHT TO OCCUPY THE SPACE AT A REDUCED RENT, DOES NOT CONSTITUTE A TAKING DIRECTLY CONFLICTS WITH FEDERAL APPELLATE DECISIONS 18

The Ruling on Appeal 18

The Federal Case 25

The Federal Claim Did Not Even Exist at the Time the State Court Purported to Dispose of It 28

(a) Elements of a Cause of Action for Fifth Amendment Taking Claim 28

The Petition for Review to the California Supreme Court 31

WHY THIS WRIT SHOULD BE GRANTED 32

IN CONCLUSION 35

INDEX TO APPENDIX

A. OPINION of the California Court of Appeal, Sixth Appellate District, filed May 10, 1991.

B. ORDER of the California Supreme Court denying Petition for Review, filed July 17, 1991.

C. ORDER of the Superior Court of the State of California for the County of Santa Clara on Plaintiff's Motion for Entry of dismissal of Complaint, filed February 15, 1990.

D. California Mobilehome Residency Laws, (Cal. Civ. Code §§ 798 et seq.) (Excerpts)

TABLE OF AUTHORITIES

CASES **PAGE**

Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990) 14, 17, 32, 35

Casella, et al., v. City of Morgan Hill, 230 Cal.App.3d 43, 280 Cal.Rptr. 876 inter alia

Casella v. City of Morgan Hill N.D.Cal. No. C-91-1034-EFL 26

Eamiello v. Liberty Mobile Home Sales, 208 Conn. 620, 546 A.2d 805 (1988) app. dism., __ U.S. __, 109 S.Ct. 1104 (1989) 24, 25

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) 8, 9, 11, 14, 15, 16, 18, 20, 23, 24, 25, 32, 34

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 20

Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987) 15

Palomar Mobilehome Park Association v. City of San Marcos, 4th Civ. App. D011484 3

Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990)
9, 14, 17, 25, 32, 33, 34

Sierra Lakes Reserve v. City of Rocklin, (9th Cir. July 9, 1991) 938 F.2d 951
9

Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), cert. den. __ U.S. __, 110 S.Ct. 1317 (1990)
27, 30, 31

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985)
26, 27, 28, 29

Yee v. City of Escondido, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990)
3, 20, 26

STATUTES

Fifth Amendment to the U.S. Const.
5, 12, 13, 19, 25, 26, 27, 28, 29, 30, 33, 34

Fourteenth Amendment to the U.S. Const.
12, 14, 15, 19, 25, 26, 33, 34

42 U.S.C. § 1983, et seq. 26

California Constitution, Article I, Sec. 19
5, 10, 12, 19

California Mobilehome Residency
Law (Cal. Civ. Code §§ 798 et seq.)
7, 8, 24

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT CASELLA, MARY JO CASELLA, BILLY BAXLEY, CLARA BAXLEY, DONALD WETTERSTROM, INDIANOLA WETTERSTROM, ALLAN C. ROMAN, JACKIE ROMAN, collectively a California General Partnership dba HACIENDA VALLEY MOBILE HOME ESTATES,

Petitioners

vs.

THE CITY OF MORGAN HILL, a Municipal Corporation,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

Petitioners, Robert Casella, Mary Jo Casella, Billy Baxley, Clara Baxley, Donald Wetterstrom, Indianola Wetterstrom, Allan C. Roman, Jackie Roman, collectively a California General Partnership doing business as HACIENDA VALLEY MOBILE HOME

ESTATES pray that a writ of certiorari issue to review the decision and judgment of the Sixth Appellate District, Court of Appeal of the State of California, filed on May 10, 1991, in Casella, et al., v. City of Morgan Hill, 6th App. No. H006972.

OPINIONS BELOW

The decision of the Sixth Appellate District, Court of Appeal of the State of California, whose judgment is here sought to be reviewed, was issued on May 10, 1991, and became final on the issuance of the remittitur on July 22, 1991. The opinion is reported at 230 Cal.App.3d 43, 280 Cal.Rptr. 876, and a copy of the Court's decision is located at **Appendix A** to this Petition.

The discretionary review of the California Supreme Court was sought by petitioners, and denied on July 17, 1991. A copy of the Order of the California

Supreme Court denying the Petition for Review in this case appears in **Appendix B** to this Petition.

The California Supreme Court has also denied Petitions for Review in the cases of Yee, et al. v. City of Escondido, 224 Cal.App.3d 1379, 274 Cal.Rptr. 551 (1990) rev. den. 01-24-91, and Palomar Mobilehome Park Association v. City of Escondido, 4th Civ. No. D011484, rev. den. 04-17-91, which have the same effect and holding as the opinion in this case, and for which Petitions for Writ of Certiorari are currently pending in this Court, Docket Nos.90-1947 and 90-1824, respectively.

The Superior Court of the State of California in and for the County of Santa Clara entered judgment dismissing the Casella plaintiffs' complaint on demurrer for failure to state a cause of action on February 15, 1990, after plaintiffs

elected not to amend their Complaint and a copy of the court's order is located at **Appendix C** to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The decision and judgment of the Sixth Appellate District, Court of Appeal of the State of California, was filed on May 10, 1991. That judgment and decision affirmed the order of dismissal of the Superior Court of Santa Clara County, California, following plaintiffs' election not to amend after the granting of the demurrer of the City of Morgan Hill for failure to state a cause of action.

A timely petition for the discretionary review of the Supreme Court of the State of California was denied by Order on July 17, 1991.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of. . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

California Constitution

The California Constitution, Article I, Sec. 19, provides:

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain

proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

Morgan Hill Ordinances

The amended version of the Morgan Hill Mobilehome Rent Control Ordinance challenged in this lawsuit was enacted on February 17, 1988, and a copy of Ordinance No. 856 was attached to plaintiffs' Complaint. Ordinance No. 856, by its Title, amended Chapters 2.64 and 5.36 of the Morgan Hill Municipal Code, and provided, in relevant part, that the space rent could not be increased upon transfer of ownership of a mobile home which remains in the Park, but only a "one time administrative fee of Twenty-five ($25.00) Dollars may be imposed. . .to provide a. . .compensation payment for

administrative bookkeeping charges in connection with the ownership transfer". (Sections 5.36.030 and 5.36.060 of the Morgan Hill Municipal Code).

This restriction on rent increases at the time of transfer of ownership of a mobile home remaining in place in a Park is referred to as "vacancy control".

On October 4, 1989, after the filing of plaintiffs' lawsuit, Ordinance No. 940 was enacted to provide for full "vacancy decontrol", rendering injunctive relief against further enforcement sought by plaintiffs moot, leaving only the issues of declaratory relief and damages from the unconstitutional effects of "vacancy control".

California Statutes

The California Mobilehome Residency Law (Cal. Civ. Code §§ 798 et seq.), specifically §§ 798.55, 798.56 & 798.74,

protect tenants from eviction from a mobilehome park and requires the Park approve for tenancy any purchaser of a mobilehome that will remain in the park if the purchaser has the financial ability to pay the rent and does not have a prior tenancy history indicating he or she will not comply with the rules and regulations of the park. (Pertinent portions of Cal. Civ. Code §§ 798 et seq. are set forth in **Appendix D** to this Petition.)

STATEMENT OF CASE

This Petition seeks review of the California Sixth Appellate Court's opinion and judgment denying an unconstitutional taking of property results from vacancy control in mobilehome park rent control ordinances, in direct contravention to the federal law as established in both the Ninth and Third Circuits under Hall v. City of Santa Barbara, 833 F.2d 1270 (9th

Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990) and recently reaffirmed in Sierra Lakes Reserve v. City of Rocklin, (9th Cir. July 9, 1991) 938 F.2d 951.

PROCEDURAL BACKGROUND AND HOW THE FEDERAL QUESTIONS AROSE

The Complaint

The Casella plaintiffs filed suit in the Santa Clara County Superior Court on August 30, 1989, challenging the constitutionality, as applied, of the City of Morgan Hill's mobilehome rent control ordinance on the basis that the inability of the plaintiff parkowners to raise rents on a space at the time a mobilehome is sold in-place effects a taking of property which is specifically condemned in Hall v. City of Santa Barbara, supra, by allowing

the outgoing tenant to sell along with his or her trailer the right to occupy a space at less than market rents, for which a quantifiable premium is received by the outgoing tenant representing the value of the right to occupy and for which the landlord parkowner receives nothing.

The Casella plaintiffs' complaint sought compensation for the alleged taking under the California State Constitution, Article 1, Section 19. Plaintiffs also sought declaratory and injunctive relief against further enforcement of the ordinance, and attorneys' fees under Cal. Civ. Proc. § 1036. (Complaint, S.C.S.Ct. Case No. 689717).

The Demurrer

The City of Morgan Hill filed a demurrer to the Complaint on October 17, 1989, alleging that plaintiffs had not stated facts sufficient to state a cause

of action as to both their first and second causes of action because Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940 (1988) "is not binding on this Court" and that the same causes of action were the subject of another pending action between the same parties. (Defendant City of Morgan Hill's Memorandum of Points & Authorities in Support of Demurrer).

Plaintiffs' Opposition

Plaintiffs opposed the demurrer, arguing that as Hall v. City of Santa Barbara, supra, constituted the entire published case law on point to this litigation it was, thus, controlling, and that the City's ordinance, superimposed upon the preexisting California Mobilehome Residency law, effected a taking in the same way as did the ordinance found unconstitutional in Hall.

Plaintiffs argued that by allowing the departing tenant to sell the right to occupy the rent-controlled space, a taking had occurred which was compensable under the California Constitution, Article 1, Section 19, and for which taking without compensation was protected by the Fifth (and Fourteenth) amendments to the U.S. Constitution.

Plaintiffs further argued that the inability to raise rents at the time of sale was an irrational exercise of police powers because it did not rationally relate to a legitimate governmental interest in preserving low cost housing opportunities because the incoming tenant pays more due to the premium received by the outgoing tenant than would be paid if the landlord were allowed to raise rents to market levels. (Points and Authorities

in Opposition to Demurrer, filed October 24, 1989).

The Ruling on Demurrer

The Superior Court ruled for the defendant City granting the demurrer at hearing on November 27, 1989, without specifying the basis of its decision, with thirty days' leave to amend. Plaintiffs elected to stand on their original Complaint and a dismissal was entered on February 15, 1990.

The Appeal

Plaintiffs timely appealed the dismissal to the Sixth Appellate District Court of Appeals of the State of California. On appeal, plaintiffs argued that the effect of the City of Morgan Hill's mobilehome park rent control ordinance with vacancy control was an unconstitutional taking under both the California Constitution and the Fifth and

Fourteenth amendments to the U.S. Constitution and that this taking due to vacancy control was recognized and condemned as a physical occupation taking of property requiring compensation both in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and in Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990).

Plaintiffs argued that the federal cases constituted the controlling law as it was the only law on point to this litigation and noted that the Central District had followed Hall, supra, in Azul Pacifico v. City of Los Angeles, (C.D.Cal. Case No. CV 87-2287-LEW) (now published at 740 F.Supp. 772 (C.D.Cal. 1990)) in rendering judgment for plaintiff and invalidating the Los Angeles mobilehome

park rent ordinance because it did not provide for vacancy decontrol and, thus, effected an unconstitutional taking of property without compensation.

Casella further argued that the ordinance violated the due process clause of the fourteenth amendment because it did not substantially advance legitimate state interests, while effecting a physical taking of property, citing, inter alia, to Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987) and was, thus, an irrational exercise of the City's police powers. (Appellant's Opening Brief, filed August 17, 1990.)

The City argued that its ordinance was different from that found unconstitutional in Hall, supra, that it is the State Mobilehome Residency law which affords the "secure tenure", not the City's ordinance, and that "the Hall case is against the

weight of authority", and not binding on the State Appeals Court.

Further, the City argued that plaintiffs' complaint only alleged a violation of the California Constitution, not the United States Constitution and as "damages are not available under California law for takings in land use cases" citing Agins v. City of Tiburon, 24 Cal.3d 266 (1979) aff'd 447 U.S. 255 (1980), the demurrer was properly sustained.

The City argued, as it had in the Superior Court, that there was another action pending between the parties precluding the instant lawsuit. (Respondent's Brief, filed October 17, 1990).

Appellant argued in Reply that, contrary to Respondent's assertions, there was no federal case law contrary to Hall,

supra, Pinewood Estates, supra, and Azul Pacifico, supra, as no other case addressed the issues in this litigation. Appellant explained the cases cited by the City were all distinguished from the present litigation in material ways which compelled the following of the federal cases which had specifically found vacancy control provisions of mobilehome park rent control ordinances effected a taking requiring compensation.

Appellant further argued that the prior case could not have disposed of the takings alleged in their Complaint as the prior suit challenged a prior version of the ordinance, on its face, not as applied, and as each sale involved a separate taking, a new cause of action arises upon each sale. (Appellant's Reply Brief, filed November 5, 1990).

THE STATE COURT OF APPEALS DECISION, THAT THE FORCED TRANSFER OF THE "PREMIUM VALUE" FROM LANDLORD TO TENANT, WHICH PREMIUM REPRESENTS THE RIGHT TO OCCUPY THE SPACE AT A REDUCED RENT, DOES NOT CONSTITUTE A TAKING DIRECTLY CONFLICTS WITH FEDERAL APPELLATE DECISIONS.

The Ruling on Appeal

The Sixth Appellate court issued its ruling on May 10, 1991, affirming the trial court's dismissal.

The Sixth Appellate decision, after concluding that the pleadings in this case stated facts insufficient to constitute a taking, specifically acknowledges, "[We] join the other California appellate district which has rejected the contrary result espoused by the Ninth Circuit Court of Appeals in Hall v. City of Santa Barbara, 833 F.2d 1270, (9th Cir. 1987)

cert. den. (1988) 485 U.S. 940."

(Opinion, **Appendix A**, p. 12)

The Court begins its discussion of the "taking" under the heading "Does the Morgan Hill Ordinance constitute a Taking?" After setting forth the provisions of the Fifth amendment to the U.S. Constitution, recognizing its application to the states through the Fourteenth amendment and summarizing Article I, Section 19, of the California Constitution, the Court notes the similarity of this case to the Hall case, and then, proceeds "to examine the Ninth Circuit's holding in Hall." In the next fourteen pages of the Opinion, the Court directs its attention to the reasons it finds Hall unpersuasive, citing many times to law review articles, and primarily to an article by Karl Manheim, professor of law at Loyola University and associate

counsel on at least one identical case currently pending in the California state courts.[1] (Opinion, **Appendix A**, pp. 13-41).

The Court below essentially "overruled" the Hall, supra, decision, saying:

> Like the California appellate district which has considered the issue before us (see Yee v. City of Escondido (1990) 224 Cal.App.3d 1349), we repudiate Hall's attempt to bootstrap a mobile home rent control ordinance - an economic regulation - to the Supreme Court's "very narrow" holding in Loretto. (458 U.S. at p. 441).

Opinion, **Appendix A**, p. 24.

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[1] This Court may take judicial notice of the fact that Karl Manheim is associate counsel in the case of Heath v. County of Santa Barbara, 2nd App. No. B 054566 (Santa Barbara S.Ct. No. 180 417).

In Hall v. City of Santa Barbara (9th Cir. 1987) 833 F.2d 1270, cert. den. (1988) 485 U.S. 940, the Ninth Circuit, confirming the unanimous panel, and denying rehearing en banc, addressing defendants' arguments that controlling case law precluded plaintiffs' complaint, arguments mirrored in this case by the City of Morgan Hill, said:

> We have examined the cases cited by the city and find them distinguishable in a way we think the Supreme Court would find material. In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a

monetary windfall by selling this right to others.

This is not a minor difference; it is crucial. The fact that the tenant can sell his interest to third parties drastically affects the economic realities of the landlord/tenant relationship. The typical rent control statute modifies the landlord/tenant relationship somewhat to protect tenants from perceived evils of the free-enterprise system. But see n. 26 infra. By contrast, the Santa Barbara Ordinance, as it is alleged to operate, changes the fundamental relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the

> right to control who will occupy the property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.

Hall, supra, 833 F.2d at 1278-1279.

In its decision, the Sixth Appellate Court refers to the above-cited portion of the Hall opinion by saying:

> What Hall found crucial, we regard as truism; an inevitable part of the unique relationship between a mobile home park owner and his or her tenant. The park owner has an equity interest in the park land; the tenant in his or her coach.

Opinion, **Appendix A**, p. 27.

The Court goes on to state:

> It is undisputed that economic controls on the mobile home housing market allow tenant mobile home owners to reap an economic benefit as a result of rent control. That such regulations have this effect does not answer the question whether the measure constitutes a taking, however.

Opinion, **Appendix A**, p. 28.

In rejecting the Hall case, the Court then goes on to say it does find persuasive the Connecticut case of Eamiello v. Liberty Mobile Home Sales (Conn. 1988) 546 A.2d 805, which upheld a law nearly identical to California's Mobilehome Residency laws (codified at California Civil Code §§ 798 et seq), which provides various protections for tenants of mobilehome parks, but, significantly, does not in any way control rental rates, and thus, cannot be properly

applied to the present set of facts to determine a taking does not exist. Yet the Sixth Appellate Court did so apply the Eamiello case. (Opinion, **Appendix A**, pp. 32-34).

In its determination that plaintiffs had not stated a cognizable taking claim, the Sixth Appellate Court was adjudicating plaintiffs' claims under the Fifth (and Fourteenth) amendments to the U.S. Constitution as well as under the California Constitution. (Opinion, **Appendix A**, p. 13). However, in so ruling, the California Court specifically rejected the Hall, supra, case and failed to even address the Pinewood Estates, supra, case.

The Federal Case

The Casella plaintiffs filed an action in the U.S. District Court for the Northern District of California on April

4, 1991, (N.D.Cal. No. C-91-1034-EFL). In that Complaint, plaintiffs sought damages for the taking due to vacancy control under 42 U.S.C. §§ 1983 et seq., alleging a taking in violation of the Fifth and Fourteenth amendments to the U.S. Constitution.

In the federal Complaint, plaintiffs specifically alleged that no remedies exist in California for the taking complained of due to the published decision in Yee, supra, and in Peppard v. City of Carpinteria, since depublished, and thus there were no longer any state remedies to exhaust as required under Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985), and thus plaintiffs' federal taking claims were now ripe.

The City of Morgan Hill filed a Motion to Dismiss on the grounds that plaintiffs'

federal case was barred by the doctrine of res judicata from the preclusive effect of the state court lawsuit on the federal suit.

Plaintiffs opposed the Motion arguing that as the federal taking claims do not exist until the state denies compensation, citing Williamson, supra, and Sinaloa Lake Owners Assn. v. City of Simi Valley, 882 F.2d 1398, (9th Cir. 1989) cert. denied, ___ U.S.___, 110 S.Ct. 1317 (1990), plaintiffs' Fifth amendment claims could not have been disposed of in the State Court action as they only arose when the state denied compensation, or alternatively, when it became certain that a state remedy did not exist.

The federal District Court issued its decision granting the City's Motion to Dismiss on October 4, 1991, on the grounds that plaintiffs' federal complaint was

barred by the res judicata effect of this State Court action.

Petitioners contend that if this Court does not grant review in this case, the federal District court should be ordered to take jurisdiction of the federal case.

The Federal Claim Did Not Even Exist At the Time the State Court Purported To Dispose of it

(a) Elements of a Cause of Action For Fifth Amendment Taking Claim.

The court in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985) set forth the elements of a taking claim under the Fifth amendment as follows:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.. . .If the government has provided an adequate process for

> taking compensation and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.. . .Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. . . .Thus, the state's action is not "complete" in the sense of causing the constitutional injury "unless or until the state fails to provide an adequate post deprivation remedy for the property loss".

Williamson Planning Comm., supra, 473 U.S. at 194-195, (internal citations omitted).

There are, thus, at least two elements to a taking claim under the Fifth

amendment: (1) a taking, and (2) a failure of post deprivation remedies to provide just compensation.

The second element for a taking under federal law is that the State by its conduct establish that adequate compensation will not be provided. That element can only be satisfied by utilizing state procedures, if available, completing them without success, and then, and only then, is there a federal right under the Fifth Amendment. It is at that time of completion that plaintiffs' federal claims arise.

Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), cert. den. __ U.S. __, 110 S.Ct. 1317 (1990) speaks to exactly the same point:

> So long as the state provides "an adequate process for obtaining

compensation," no constitutional violation can occur until the state denies just compensation.

Sinaloa, supra, 882 F.2d at 1402, (emphasis added).

Since the state courts of California have failed to provide just compensation, the federal claim ripens only after state court action is complete and thus, the purported ruling on the federal claim is an act without any effect since the federal claim did not exist until and after the state court proceedings on the matter had come to an end.

The Petition for Review to the California Supreme Court

A Petition for (the discretionary) Review to the California Supreme Court was timely filed by Casella. Petitioners argued that the California Supreme Court should take the case for review as the

decision rendered in the Sixth Appellate District, is in direct contravention to federal case law established by the Hall, Pinewood Estates, and Azul Pacifico cases (cited supra). However, the California Supreme Court entered an order denying the Petition on July 17, 1991.

WHY THIS WRIT SHOULD BE GRANTED

Special and important reasons exist for the granting of this Petition for Review as identified in Supreme Court Rule 10. The important questions of federal law presented here have never been ruled upon by this Court.

As specifically enunciated in Supreme Court Rule 10 (b), review may be granted:

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of a U.S. court of appeals.

In Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), the Ninth Circuit Court found the Santa Barbara mobilehome rent control ordinance, identical in legal effect to the ordinance in Morgan Hill, effected an unconstitutional taking without compensation.

In Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990), the Third Circuit found that vacancy control provisions of the Barnegat mobilehome park rent control ordinance in conjunction with state law (similar to the California Mobilehome Residency laws) effected a physical occupation taking without compensation in violation of the Fifth and Fourteenth amendments to the U.S. Constitution.

The state court here specifically rejected the viability of the Hall, supra, case and did not even address the Pinewood, supra, case in its decision. Concluding that they were not bound to follow the Ninth Circuit decision, the Court determined that plaintiffs could not state a cause of action under either the California Constitution or the federal Constitution.

Petitioners contend the California state courts erred in determining federal rights under the Fifth and Fourteenth amendments in contravention of the entire published federal case law on point. In essence, by refusing to accept the precedence established in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), Pinewood Estates of Michigan v. Barnegat Township,

898 F.2d 347 (3rd Cir. 1990), and further explained in Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990), while determining that plaintiff petitioners had failed to state a cognizable taking claim, the California Sixth Appellate court has effectively overruled the decisions of two unanimous federal appeals courts.

Such flagrant disregard for federal law cannot be tolerated. This Supreme Court should grant this Petition for Review to protect this and similar plaintiff property owners from having their constitutional rights extinguished by state courts who fail to follow federal court precedence on issues of federal law.

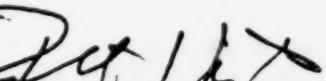
IN CONCLUSION

Petitioners request this court to grant their petition for review or in the alternative to remand to the lower court

with instructions to limit its decision to state constitutional issues or to follow federal law when ruling on federal constitutional issues. A third alternative is for this Court to order the federal District court to take jurisdiction of petitioners' claims.

Respectfully submitted,

LAW OFFICES OF JAGIELLO & PECH

By 

ROBERT J. JAGIELLO
Attorneys for Petitioners

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ROBERT CASELLA, et al., H006972

Plaintiffs and Appellants,

v.

CITY OF MORGAN HILL,

Defendant and Respondent.

(Santa Clara County Court
No. 689717)

FILED May 10, 1991

CERTIFIED FOR PUBLICATION

Appellants, owners of a mobile home park, challenge the effect of a City of Morgan Hill mobile home rent control ordinance, claiming that its lack of a "vacancy decontrol" provision, which allows rents to be returned to market levels when a tenant leaves, effected a taking of their property without just compensation. We conclude that the

pleadings here state facts insufficient to constitute a taking, and join the other California appellate district which has rejected the contrary result espoused by the Ninth Circuit Court of Appeals in Hall v. City of Santa Barbara (1986) 833 F.2d 1270, cert.den. (1988) 485 U.S. 940. In consequence, we affirm the trial court's dismissal order.

BACKGROUND

Appellants Robert Casella et al are general partners who own Hacienda Valley Mobile Home Estates, a mobile home park. Respondent City of Morgan Hill (City) first enacted a mobile home rent stabilization ordinance in March 1983.[1]

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[1] The "Findings and Purpose" section of this ordinance states: "Mobile home owners, unlike apartment tenants or residents of other rental stock, are in the unique position of having made a substantial investment in a residence for which space is rented or leased. Removal and/or relocation of a mobile home from a park space is not a practical alternative

to accepting an excessive rent increase in that it can only be accomplished at substantial costs, and in many instances may cause extensive damage to the mobile home and loss of appurtenances such as integrated landscaping and supporting structures inconsistent with the new location. Because mobile homes are often owned by senior citizens, persons on fixed incomes, and persons of low and moderate income, exorbitant rent increases fall upon these individuals with particular harshness. (Section IV-12-1.01.) [¶] The City has sponsored extensive negotiations to eliminate the need for this ordinance. Only one of the City's mobile home parks achieved a mediated solution as a result of this delay. The remaining parks were unable to reach agreement after extensive negotiations; thus, necessitating this ordinance. (Section IV-12-1.02.) [¶] Since approximately July, 1981, a heightened pattern of excessive rent increases has emerged within some of the mobile home parks in Morgan Hill in disregard of the purposes and intent of the city's previous ordinances. Incorporation of these unduly excessive prior increases within the rate structure of this ordinance without provisions for their review would materially defeat the purpose and intent of this Ordinance and the stability it seeks to bring about. (Section IV-12-1.03.) [¶] The City Council of Morgan Hill declares that it is necessary in the public interest to establish a means by which to resolve the potentially divisive and harmful impasse between park owners and coach owners. After consideration of

This ordinance generally regulated rental increases and included a "vacancy control" provision, which limited mobile home park owners to increased space rents of no more than 75 per cent of the Consumer Price Index (CPI) or 8%, whichever was less, when a mobile home changed ownership but stayed in the park.

This ordinance was amended in 1986 to allow no rental increase, but a one-time $25.00 administrative fee charge when such a change of ownership occurred. It is this inability to raise rents at the time ownerships transferred to market levels which was the basis of this lawsuit. The ordinance was amended again, effective

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numerous factors, among which are the relatively small number of parks located within the City of Morgan Hill, the level of organization and communication between the mobile home owners in each park, and the mandates of State Law, regulations which best fit the needs of this City have been selected." (Section IV-12-1.04.)

October 4, 1989, to provide for "vacancy decontrol;" it excepted from the ordinance's restrictions increases on rents during a 30-day period commencing on a transfer of ownership of a mobile home coach (coach) within the park.

Appellants filed a complaint against the City on August 30, 1989. The complaint stated causes of action for declaratory relief and inverse condemnation and prayed in addition for an injunction and damages.

The complaint alleged that the city's ordinance "has the effect of keeping rents below market rentals otherwise obtainable by plaintiff upon turnover of any given unit in plaintiff's park," that this resulted in "enabling the tenants to monetize the rent savings upon the sale of their mobile homes to third parties, and thus constitutes an impermissible transfer

of wealth by the defendant to the departing tenants" in violation of the California Constitution. It alleged that the statute did not serve the "legitimate governmental purpose of preserving low or affordable housing" because "it enables the tenant in place to sell the mobile home for a 'premium' due to the existence of rent control, and thus dramatically increases the mobile home price resulting in forever burdening the space with the need to pay the additional premium, or to finance the additional premium . . ."

The complaint further alleged that the ordinance constituted a taking of appellants' right to enter into a long-term lease with incoming tenants since "[b]ut for the [o]rdinance" such a lease would be for "the consideration which the departing tenant, by virtue of the [o]rdinance, is now able to receive in a

disguised form by receiving a 'premium' for the price of the coach which the departing tenant sells." As a consequence, the complaint alleged, "the [o]rdinance has effected the total transfer of all of the appreciated value of the pad from the landlord to the tenant, which the tenant realizes at the time of sale of a coach."

The city filed a demurrer to this complaint on October 17, 1989. The demurrer alleged that appellants had failed to state facts sufficient to state a cause of action, and that the same causes of action were the subject of another lawsuit between the parties.

As to the latter allegation, the facts as stated in the city's brief are that an action was filed against the city on March 19, 1984, by Allan Roman et al. The plaintiffs in that suit are the same

general partners in Hacienda Valley Mobile Home Estates as are those in the present suit. The roman suit, like this one, challenged the city's rent stabilization ordinance, specifically the vacancy control provision. It also alleged, inter alia, an unconstitutional taking of property without just compensation. The city moved for summary judgment or alternatively for summary adjudication of the issues. The trial court ruled in November 1984 that the ordinance did not constitute a taking on its face. This order was never memorialized in writing, however, the case was not pursued by the plaintiffs. Now, although the five-year statute has run, the suit has neither been dismissed nor prosecuted and is still pending.

In the present suit, the trial court sustained the city's demurrer and

dismissed the complaint on appellants' election not to amend. This appeal ensued.

DISCUSSION

When reviewing a dismissal based on a demurrer, an appellate court will review the facts alleged in the complaint in the light of the well-established principle that "allegations of the complaint which are not contrary to law or to a fact of which this court may take judicial notice must be deemed to be true." (Dale v. City of Mountain View (1976) 55 Cal.App.3d 101, 105, ...)" (Terminals Equipment Co. v. City and County of San Francisco (1990) 221 Cal.App.3d 234, 238.) "'A demurrer admits all material and issuable facts properly pleaded. [Citations.] However, it does not admit contentions, deductions or conclusions of fact or law alleged therein. [Citations.]' Daar v. Yellow

Cab Co. (1967) 67 Cal.2d 695, 713 . . . ; see also White v. Davis (1975) 13 Cal.3d 757, 765 . . . .) Thus, while allegations of the complaint are deemed to be true in ruling on a demurrer, 'where an allegation is contrary to law or to a fact of which a court may take judicial notice, it is to be treated as a nullity [citations].' (Dale v. City of Mountain View, supra, 55 Cal.App.3d at p. 105.) [¶] Where the trial court sustains a demurrer with leave to amend but the plaintiff elects not to amend, there is a presumption that the plaintiff has stated as strong a case as he or she can. In such instances, in determining whether the trial court has abused its discretion, the appellate court must resolve all ambiguities and uncertainties raised by the demurrer against the plaintiff; 'if the complaint is objectionable on any

ground raised by the demurrer, the judgment of dismissal must be affirmed. [Citations.]' (Hopper v. Deukmejian (1981) 122 Cal.App.3d 987, 994 . . .)" (Terminals Equipment co. v. City and County of San Francisco, supra, 221 Cal.App.3d at pp. 241-241.) With this standard of review in mind, we turn to the merits of appellants' claims.

I. Previous Action

As a preliminary, the city contends that the trial court properly sustained its demurrer on the ground that the previously-mentioned Roman suit was pending. In essence, they content the Roman suit, which also sounds in inverse condemnation, precludes the present challenge and appellants are estopped from challenging the ordinance on this ground.\

Within states the rule as follows: "A second action between the same parties on

a different cause of action is not precluded by a former judgment . . . . But the first judgment 'operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." (7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 253, p. 691; McClain v. Rush (1989) 216 Cal.App.3d 18, 28-29.)

The city has alleged that the trial court ruled in its favor on a facial challenge to the ordinance. It concedes this ruling was never memorialized in writing, however. Since the trial court's adjudication was interlocutory and non-appealable, it has no res judicata effect and does not constitute an estoppel. (See De La Pena v. Wolfe (1986) 177 Cal.App.3d 481, 485; 7 Witkin, supra, § 188, pp. 621-622, § 219, p. 655-656.)

II. Does the Morgan Hill Rent Control Ordinance Constitute a Taking?

The protection of private property rights is guaranteed by the Fifth Amendment to the United States Constitution: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fifth Amendment is made applicable to the states by the due process clause of the Fourteenth Amendment. (Chicago, Burlington etc. R'D v. Chicago (1897) 166 U.S. 226, 239.) Article I, Section 19 of the California Constitution similarly provides that compensation is required when property is "taken or damaged."

Appellants claim that the effect of the Morgan Hill mobile home rent control

ordinance is to create the right to secure tenure at reduced rents. This right, they allege, has a value, and this value is transferred to the mobile home owners (their tenants) who can then sell their mobile homes at a premium. Appellants claim this interest - in occupying a park space at reduced rent - is an attribute of property, and that the challenged ordinance transfers this "property" right to the park tenants. This "appropriation" of appellants' property interests, they claim, constitutes an unconstitutional taking.

The Ninth Circuit Court of Appeals in Hall v. City of Santa Barbara, considered the constitutionality of a mobile home rent control ordinances similar to that in this case.[2] Reduced to its essentials,

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[2] We are aware of the fact that the Santa Barbara ordinance at issues in Hall required park owners to offer the tenants

Hall held that the plaintiffs had made allegations in their complaint sufficient to constitute a claim for a taking by physical occupation, as in Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419. In Loretto, the United States Supreme Court held that a New York law which made it mandatory for landlords to permit a cable television company to install its facilities on their property - a "minor but permanent physical occupation" - constituted a compensable taking under the just compensation clause. (Id. at p. 421, 441.) Relying on Loretto, Hall held that the Santa Barbara mobile home rent control ordinance at issue transferred to mobile home park tenants a possessory interest in the park owners'

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leases of unlimited duration, and that no such requirement exists in the Morgan Hill ordinance at issue here.

land. It concluded that plaintiffs had made out a case for compensation under the takings clause and reversed the district court's dismissal order.

Tracking Hall's analysis, appellants here contend that the Morgan Hill mobile home rent control ordinance, in combination with the state's Mobile Home Residency Laws (Cal. Code, § 798 et seq.) effected a transfer of wealth from landlord to tenant, tantamount to a physical taking of property. We therefore proceed to examine the Ninth Circuit's holding in Hall.

The court began by noting a distinction between those United States Supreme Court cases which had found regulatory takings and those which found a physical occupation of property. "[D]ramatically different results," Hall notes, depend on which type of taking a

court concludes has occurred. (Hall v. City of Santa Barbara, supra, 833 F.2d at p. 1275.) Whereas a regulatory taking may be justified if it substantially advances legitimate state interests, a permanent physical occupation is taking without regard to other factors. (Id. at pp. 1274-1275.)

The Hall court then concluded that the plaintiffs' allegations "seem to present a claim for taking by physical occupation . . . that the Santa Barbara ordinance has transferred [to the tenants] a possessory interest in their land" - the right to "occupy the property in perpetuity while paying only a fraction of what it is worth in rent" - and that this interest is "transferable, has an established market and a market value . . . . [¶] The right to occupy property in perpetuity is surely

the type of interest that is protected by the taking clause." (Id. at p. 1276.)

For this latter assertion, Hall cites Professor Michelman's opinion, in his seminal article Property, Utility and Fairness: comments on the Ethical Foundations of "Just Compensation" Law (1967) 80 Harv.L.Rev. 1165, 1184, that the one "incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, a space or a thing which theretofore was understood to be under private ownership."

We suggest that the Ninth Circuit has taken Professor Michelman's example out of context. His point was that the physical invasion test, like the diminution in value test, the magnitude of harm test,

and other convenient court-made labels on governmental action, has failed to provide a meaningful distinction between those situations in which compensation has been required and those in which it has not.[3]

Professor Michelman does on to identify the physical invasions test as follows: "Probably it can be said that only those trespassory acts which are implicitly assertive of ownership - in the sense necessary to ground an action of ejectment or to start running the statutory period for acquisition of title by adverse possession - amount to such physical invasions as automatically, without further inquiry, require a

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[3] Professor Michelman concludes that "the only 'test' for compensability which is 'correct' in the sense of being directly responsive to society's purpose in engaging in a (footnote continued on next page.)

compensation payment." (Michelman, supra, 80 Harv.L.Rev. at p. 1229, fn. 110.)

It is apparent to us that the Ninth Circuit's analysis in Hall - that the effect occasioned by the combination of the state regulations and the local ordinance was a "physical invasions" - was no more than a convenient means, as Professor Michelman suggested, or distinguishing a loss the court considered "clearly compensable" from one which it did not. (Michelman, supra, 80 Harv.L.Rev. at p. 1228). To indulge in this shorthand, however, does not explain why compensation must be paid for this regulation, as opposed to other regulations which effect a redistribution of wealth for the general social good.

Professor Manheim has criticized the Loretto physical occupation test utilized by Hall as follows: "While perhaps

logically appealing, the distinction drawn in Loretto between temporary and permanent interferences with possessory interests has two defects. It is too drastic and it is unworkable . . . Although permanent occupations are more serious intrusions than temporary invasions, the Court's bright line distinction places too much emphasis on the duration factor, which is not always easily determined at the point when review is undertaken. It seems the Court has replaced Justice Holmes' 'too far' doctrine (Penna. Coal Co. v. Mahon (1922) 260 U.S. 393, 415, with an equally problematic one: 'too long.' In the Court's usage, permanency assumes 'metaphysical' contours and serves as a 'talisman' in the determination of whether 'fairness and justice' preclude imposing a burden on the property owner." (Manehim, Tenant Eviction Protection and the Takings

Clause, 1989 Wis.L.Rev. 925, 989-990, fns. omitted.)

Other commentators have criticized the physical occupation/regulatory taking dichotomy itself: "[T]here is in fact no practical difference between physically seizing property and preventing its owner from using it . . . Moreover, forcing someone to do things with his property - telling him "you can keep it but you can't use it - is indistinguishable, in ordinary terms, from grabbing it and handling it over to someone else. Thus, a 'taking' occurs in this ordinary sense when government controls a person's use of property so tightly that, although some uses remain in the owner, the property's value has been virtually destroyed." (L. Tribe, American Constitutional Law 460 (1978) [footnotes omitted, emphasis in original], quoted in Berger & Kanner,

Thoughts on the White River Junction Manifesto: A Reply to the 'Gang of Five's' Vies on Just Compensation for Regulatory Taking of Property, (1986) 19 Loy of L.A. L.Rev. 686, 687, fn. 10.)

Although aware of this criticism, the Ninth Circuit felt "bound to respect the distinction as drawn by the Supreme Court." (Hall v. City of Santa Barbara, supra, 833 F.2d at p. 1275, fn.13.) Even respecting this distinction, we reject Hall's espousal of the notion that economic regulation such as the rent control measure challenged here could metamorphose into the type of physical occupation described in Loretto. We are cognizant of Profession Manheim's caution that "[c]ourts should be wary of construing the . . . 'permanent physical occupation' language of Loretto literally . . . Loretto's per se rule has already

been narrowed, and ought to be further limited. (Manheim, supra, 1989 Wis.L.Rev. at p. 1012, [fns. omitted.].) Manheim, along with other commentators, suggests that what is required under both physical occupation and regulatory takings analysis is a "realistic appraisal of the law's actual impact on the property owner." (Id. at p. 940.)

We find Hall distinguishable in a way we think the Supreme Court would find material. (833 F.2d at p. 279.) Like the California appellate district which has considered the issues before us (see Yee v. City of Escondido (1990) 224 Cal.App.3d 1349), we repudiate Hall's attempt to bootstrap a mobile home rent control ordinance - an economic regulation - to the Supreme Court's "very narrow" holding in Loretto. (458 U.S. at p. 441; Yee v. City of Escondido, supra, 224 Cal.App.3d

at p. 1355; see also Hirsch and Hirsch, Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol (1988) 35 U,C.L.A. L.Rev. 399, 466.) Loretto upheld the "traditional rule" distinguishing physical occupation cases - which are takings per se - from regulatory takings, in which a court must analyze whether "the action achieves an important public benefit or has only minimal economic impact on the owners." (458 U.S. at pp. 434-435.) This rule, observed the Court, "also avoids difficult line-drawing problems" and problems of proof (Id. at pp. 436-437.)

The complaint in Hall alleged that the price of mobile homes in the plaintiffs' park rose dramatically after the enactment of rent control. Plaintiffs claimed that "the substantial premium paid for mobile

homes in parks subject to the Santa Barbara Ordinance reflects the transfer of a valuable property right to occupy mobile home parks at below-market rates." (Hall v. City of Santa Barbara, supra, 833 F.2d at p. 1274.) Hall agreed, finding "crucial" to its analysis the claim that the mobile home park tenants were able to "derive an economic benefit from the statutory leasehold by capturing a rent control premium" (Id. at p. 1276) when they sold their mobile homes and that the tenants' right to possess the park owners' property at reduced rates was "transferable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." (Id. at p. 1278.) Hall concluded from this that the ordinance "changes the fundamental

relationship between the parties, giving landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simply ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him . . ." (Id. at p. 1279.)

What Hall found crucial, we regard as a truism; an inevitable part of the unique relationship between a mobile home park owner and his or her tenant. The park owner has an equity interest in the park land; the tenant in his or her coach. (Cf. Hirsch and Hirsch, supra, 35 U.C.L.A. L.Rev. at p. 405: "renters or mobile home parks own the most costly part of their housing, which they have voluntarily placed on the property of another party;"

the authors refer to this as "divided ownership." [Id. at p. 419.).)

It is indisputed that economic controls on the mobile home housing market allow tenant mobile home owners to reap an economic benefit as a result of rent control. That such regulations have this effect does not answer the question whether the measure constitutes a taking, however. Professor Manheim has suggested the premises underlying Hall's conclusion - that the "economic fruits of enhanced site value [are] naturally the property of the park owner" (Manheim, supra, 1989 Wis,L.Rev. at p. 966) - is itself subject to question. (cf. id at p. 966, fn. 225 - [the question is rather whether the concept of property includes the right to change "quasi-rent;" the amount attributable to space scarcity and moving costs].) The author notes also

that "[i]n an economic sense, vacant spaces carry a substantial premium which would be capitalized into the value of the mobile home itself . . . [¶] [M]obile home rent control . . . enhances the premium value associated with park space since the new owner can be assured of stable (and below market) housing costs . . . [W]ithout rent control, a park owner could raise rents so high as to recapture any added value in the mobile home created by scarcity of sites. In a free market, the park owner would do just that . . . The mobile home buyer . . . would be willing to pay less for the mobile home by an amount equivalent to the space's separate value." (Id. at p. 936, fn. 179.)

Like others, we question Hall's failure to explain why a tenant's ability to reap an economic benefit from rent

control is crucial to a resolution of the constitutional question. As Justice Weiner points out in Yee, the mobile home rent control, which arguably benefits only the tenant in place at the time it is enacted, does not differ conceptually from other rent control, which benefits all succeeding tenants equally: "If an owner's property has been taken by the government, it should be of no constitutional consequence to whom the property has been given . . . In both cases . . . the value 'taken' from the property owner is conceptually identical." (Yee v. City of Escondido, supra, 324 Cal.App.3d at p. 1356, fn. omitted.) Professor Manheim suggests, also, that "courts ought to focus on the property owner's loss rather than the occupier's gain." (Manheim, supra, 1989 Wis.L.Rev. at p. 1012 [Fn. omitted]; see also Note,

Are Landlords Being Taken by the Good Cause Eviction Requirement? (1988) 62 So.Cal. L.Rev. 321, 350; The focus in determining whether a taking has occurred in the rent control context should "not be on what the tenant gains, but rather on what the property owner loses . . .")

As Yee and others have pointed out, the increase in the sales prices of mobile homes resulting from rent control may simply reflect the artificially law price caused by excessive rents charged prior to its enactment.[4] The mere fact that

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[4] As Professor Berger points out, "[t]he burden may seem somewhat harsher for those who are owners when rent regulation is first installed, but the usual prelude to governmental control of rents or condominium conversions is a housing shortage which allows landlords to charge high economic rents or enter the sales market. To be thwarted from exploiting a housing shortage may disappoint such owners, but commercial frustration, in the circumstances, hardly seems unjust." (Berger, Home is Where the Heart Is: A Brief Reply to Professor Epstein, 54 Brooklyn L.Rev. 1239, 1246.)

increased coach prices are a corollary to rent control does not establish that a taking has occurred, however. (Cf. Yee v. City of Escondido, supra, 224 Cal.App.3d at p. 1357.)

The Connecticut Supreme Court in Eamiello v. Liberty Mobile HOme Sales (Conn. 1988) 546 A.2d 805, examined a similar constitutional challenge in a fashion we find persuasive. The plaintiffs in that case, mobile home owners and park tenants, challenged the Connecticut statute which guaranteed a mobile home owner the right to sell on-site mobile home which was "'safe,

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Professor Berger also disputes Professor Epstein's contention (see Epstein, Rent control and Theory of Efficient Regulation, 54 Brooklyn L.Rev. (1988) 741, 756) that regulation causes rental shortages, citing the lack of empirical evidence on this score. (Berger, supra, 54 Brooklyn L.Rev. at pp. 1246-1247.)

sanitary and in conformance with aesthetic standards.'" (Id. at p. 815). Respondents, mobile home park owners, presented evidence of economic harm, like those advanced by appellants here, in that "the tenant who sells his mobile home on-site receives a greater price for his home than it would otherwise bring because of the right to continued occupancy of the site that is also transferable to the purchaser." (Id. at p. 820.)

The Connecticut Supreme Court squarely rejected this argument: "Because of the scarcity of mobile home sites, resulting largely from zoning ordinances that bar the establishment of new mobile home developments, the legislature could reasonably have concluded that a substantial portion of the price paid for a mobile home purchased on-site is attributable to the continuing right to

lease the site that accompanies the sale. If the mobile home park operator could require the site to be vacated, he, rather than the tenant, would be in the position to demand for a mobile home that he had placed on the site a price greater than the home itself would bring because of the right to continued occupancy that is incident to the sale. In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, [the statute] strikes a reasonably fair balance between the economic interests of mobile home tenants and those of mobile home park operators." (546 A.2d at p. 820.)

Professor Manheim points out that the Eamiello result is more consistent than the Hall result with California property law, which considers leasehold value the property of the tenant, not the landlord. (Manheim. supra, 1989 Wis.L.Rev. at p. 966, fn. 225, citing 4 H. Miller and M. Starr, Current Law of Cal. Real Estate § 27:92 (1977 & Supp. 1984); Kendall v. Pestana (1988) 40 Cal.3d 488.)

Even so vociferous a critic of rent control per se as Professor Epstein has rejected both the distinctions invoked by the Ninth Circuit to invalidate the ordinance in Hall; the "now standard, if largely unintelligible," Supreme Court distinction between physical and regulatory takings, and the fact that the ordinance "allowed the tenant to transfer unconditionally his leasehold, in contrast to the normal rent control statute that

denies the tenant such free alienability." "Neither distinction," concludes Professor Epstein, "passes muster, but both illustrate the rickety nature of the present doctrinal structure." (Epstein, supra, 54 Brooklyn L.Rev. at p. 756.)[5]

Appellants also suggest we should apply the stricter scrutiny outlined by the Supreme Court to test the government action at issue in Nollan v. California Coastal Comm'n (1987) 483 U.S. 825. In Nollan, property owners challenged the Commission's ability to condition a permit to rebuild their beachfront house on their transfer of a public easement across their property. (Id. at p. 827.) In reviewing their claim, the Court reiterated the rule

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[5] Professor Epstein concludes that "Hall reaches the right result, but only because all rent control statutes are unconstitutional, not because this statute is any worse than others." (Id. at p. 758.)

that land-use regulation does not effect a taking if it "'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,' Agins v. Tiburon, 447 U.S. 255, 260 (1980)." (Id. at p. 834.) In reviewing the connection between the regulation and the state interest, however, the Court determined that the "essential nexus" (Id. at p. 837) between the permit condition and the governmental purpose was lacking in that case.

This is what Hall questions; the relationship between the stated purpose of the Santa Barbara rent control ordinance, "to alleviate . . . 'a critical shortage of low and moderate income housing'" and its result, concluding that this issue should be addressed on remand. (Id. at pp. 1280-1281.)

California courts have upheld controls in the landlord-tenant arena as legitimate exercises of the police power, if they are "reasonably calculated to eliminate excessive rents and at the same time provide landlords with just and reasonable return on their property." (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 165.) And we discern nothing in the decisions of the United States Supreme Court which necessitates our heightened scrutiny of the city's legislative decision to "use rent control as a tool to correct imperfections in the market system." (Yee v. City of Escondido, supra, 224 Cal.App.3d at p. 1358.) In Pennell v. City of San Jose (1988) 484 U.S. 1, the Supreme Court, addressing a challenge to San Jose's rent and eviction law, reiterated that "'[s]tates have broad power to regulate housing conditions in

general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.'" (Id. at p. 12, fn. 6, quoting Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at p. 440; see also FCC v. Florida Power Corp. (1987) 480 U.S. 245, 252.)

Professor Manheim reads the Supreme Court's Pennell decision as indicating that the Nollan strict scrutiny approach will likely be limited to "'unconstitutional conditions' and, perhaps, possessory takings cases." He concludes that Justice Rehnquist's rejection of heightened scrutiny of the San Jose law "suggest[s], for the moment at least, deferential review of most economic regulation." (Manheim, supra, 1989 Wis.L.Rev. at pp. 948-950.) He also

points out that "[a]s Nollan shows, heightened scrutiny could yield any result depending, as it usually does, on the predilections of individual judges. For instance, some courts have adopted an economic efficiency model in analyzing takings cases . . . [¶] Hall exhibits similar distrust of majority rule, suggesting that those supposedly benefiting from legislation do not understand their own best interests. Strict scrutiny of the means-end nexus reveals judicial disagreement with underlying economic policy, in essence requiring the legislature to prove that its scheme works. However, debates about economic theory belong in journals and legislative chambers, not in the courts." (Ibid.)

We agree, as did the Hall dissenters. They stated that "'[s]ignificant doubt' as

to whether a legislative body's goals are in fact achieved is not sufficient to warrant striking down an ordinance[] . . . Legislation passes muster if the legislature reasonably could have concluded that its action would promote a legitimate state interest. The judiciary does not have the power to sit as a 'super legislature' second-guessing the wholly economic regulations of state and local governments." (833 F.2d at p,. 1284 [citations omitted], Schroder, J. Dissenting from the denial of en banc hearing.) (See also Keating, Commentary on Rent control and the Theory of Efficient Regulation (1989) 54 Brooklyn L.Rev. 1223, 1230; "The political rather than the judicial forum is the proper place for this debate over economic regulatory policy.")

The stated purpose of the city's ordinance is to control excessive rental prices for the largely fixed-income residents of mobile home parks. This is unquestionably a legitimate state interest. The City of Morgan Hill could reasonably have concluded that the mobile home rent control ordinance would promote this goal. Whether as a means to achieve its stated purpose rent control is a good idea is a political decision - one which properly rests with the legislative branch of government. We agree with Yee that this is "not a question of constitutional law for the courts." (Yee v. City of Escondido, supra, 224 Cal.App.3d at p. 1358.)

Appellants have not made a facial challenge to the rent control ordinance; they have challenged only the effect of its lack of a "vacancy decontrol"

provision. They have not alleged, however, that the ordinance has failed to provide them a fair and reasonable return on their investment, or denied them economically viable use of their land. Thus, even accepting the allegations of appellants' complaint as true, as we must for the purpose of this appeal from a dismissal on a demurer, we conclude that under no construction of the facts could appellants make out a claim for a taking without just compensation. We will therefore affirm the order of dismissal.

III. Sanctions

Last, the city has asked this court to sanction appellants for their citations to unpublished cases, in violation of California Rules of Court, Rule 977, and to strike the offending references from their briefs. We declined appellants'

request to take judicial notice of these decisions.

While respondent is correct that parties may not cite unpublished opinions, sanctions and striking are unnecessary. We have not reviewed, or relief on, any unpublished opinion so cited.

DISPOSITION

The trial court's order is affirmed.

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Elia, J.

WE CONCUR:

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Capaccioli, Acting P.J.

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Bamattre-Mancukian, Jr.

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Honorable Peter Stone
Attorneys for Plaintiffs/ Appellants	Debra K. Butler Law Offices of Jagiello & Pech
Attorneys for Defendants/ Respondents	Marc G. Hynes Emily J. cote City Attorney City of Morgan Hill

APPENDIX B

Sixth Appellate District No. H006972
S021491

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

ROBERT CASELLA ET AL., Appellants

v.

CITY OF MORGAN HILL, Respondent

Appellants' petition for review DENIED.
Panelli, J. is of the opinion the petition should be granted.
Baxter, J. did not participate.

The request for an order directing depublication of the opinion is denied.

S/LUCAS/
Chief Justice

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

ROBERT CASELLA, MARY JO CASELLA, BILLY BAXLEY, CLARA BAXLEY, DONALD WETTERSTROM, INDIANOLA WETTERSTROM, ALLAN C. ROMAN, JACKIE ROMAN, Collectively a California General Partnership dba HACIENDA VALLEY MOBILE HOME ESTATES, Plaintiffs, v. THE CITY OF MORGAN HILL, a Municipal Corporation, and DOES 1 through 10, inclusive, Defendants	CASE NO. 689717 ORDER AFTER HEARING ON PLAINTIFFS' MOTION FOR ENTRY OF DISMISSAL OF COMPLAINT DATE: 2-8-90 TIME: 9:00 a.m. DEPT: 8

FILED February 15, 1990

Plaintiffs' Motion for Order and Entry of Dismissal of Plaintiffs' Complaint came on regularly for hearing on February 8, 1990, at 9:00 a.m., in Department 8 of the above entitled Court, the Honorable Peter G. Stone presiding.

Debra K. Butler of the Lawfirm of Robert J. Jagiello & Associates appeared on behalf of the plaintiffs. No appearance was made by the attorneys for defendant.

Based upon the papers submitted, the papers and records on file and oral argument, the Court ruled as follows:

1. Defendant's Demurrer, heard on 11-27-89, was sustained with plaintiffs granted 30 days leave to amend their complaint.

2. On or about 1-30-90 defendant filed its Notice of Non-Opposition to Plaintiffs' Motion for Order and Entry of Dismissal of Complaint.

3. Plaintiffs' Request for Order and Entry of dismissal of their complaint is granted upon plaintiffs' election not to

amend their complaint.

DATED: Feb. 15, 1990

S/PETER G. STONE
JUDGE OF THE SUPERIOR COURT

Approved as to Form
and Content:

Marc G. Hynes
Marc G. Hynes,
Attorney for Defendant,
CITY OF MORGAN HILL

APPENDIX D

CALIFORNIA MOBILEHOME RESIDENCY LAWS

(EXCERPTS)

ARTICLE 6. TERMINATION OF TENANCY

§ 798.55. Protection from actual or constructive eviction; termination or refusal to renew; reasons; notice; time

(a) The Legislature finds and declares, that because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afford by the provisions of this chapter.

(b) The management shall not terminate or refuse to renew a tenancy, except for a reason specified in this

article and upon the giving of written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, as defined in Section 18005.8 of the Health and Safety Code, each junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, and the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner addressed to the legal owner and junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in Section 18091.5 of the Health and Safety Code.

§ 798.56. Authorized reasons for termination

A tenancy shall be terminated by the management only for one or more of the following reasons:

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency.

(b) Conduct by the homeowner or resident, upon the park premises, which constitutes a substantial annoyance to other homeowners or residents.

(c) Conviction of the homeowner or resident for prostitution or a felony controlled substance offense if the act resulting in the conviction was committed anywhere on the premises of the mobilehome

park, including, but not limited to, within the homeowner's mobilehome.

However, the tenancy may not be terminated for the reason specified in this subdivision if the person convicted of the offense has permanently vacated, and does not subsequently reoccupy, the mobilehome.

(d) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park which is part of the rental agreement or any amendment thereto.

No act or omission of the homeowner or resident shall constitute a failure to comply with a reasonable rule or regulation unless and until the management has given the homeowner written notice of the alleged rule or regulation violation and the homeowner or resident has failed to adhere to the rule or regulation within

seven days. However, if a homeowner has been given a written notice of an alleged violation of the same rule or regulation, on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no written notice shall be required for a subsequent violation of the same rule or regulation.

Nothing in this subdivision shall relieve the management from its obligation to demonstrate that a rule or regulation has in fact been violated.

(e)(1) Nonpayment of rent, utility charges, or reasonable incidental service charges; provided that the amount due has been unpaid for a period of at least five days from its due date, and provided, that the homeowner shall be given a three-day written notice subsequent to that five-day period to pay the amount due or to vacate

the tenancy. For purposes of this subdivision, the five-day period does not include the date the payment is due. The three-day written notice shall be given to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure. A copy of this notice shall be sent to the persons or entities specified in subdivision (b) of Section 798.55 within 10 days after notice is delivered to the homeowner. If the homeowner cures the default, the notice need not be sent. The notice may be given at the same time as the 60 days' notice required for termination of the tenancy.

(2) Payment by the homeowner prior to the expiration of the three-day notice period shall cure a default under this subdivision. In the event the homeowner does not pay prior to the expiration of the three-day notice period, the homeowner

shall remain liable for all payments due up until the time the tenancy is vacated.

(3) Payment by the legal owner, as defined in Section 18005.8 of the Health and Safety Code, any junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, or the registered owner, as defined in Section 18009.5 of the Health and Safety Code, if other than the homeowner, on behalf of the homeowner prior to the expiration of 30 calendar days following the mailing of the notice to the legal owner, each junior lienholder, and the registered owner provided in subdivision (b) of Section 798.55, shall cure a default under this subdivision with respect to that payment.

(4) Cure of a default of rent, utility charges, or reasonable incidental service charges by the legal owner, any junior lienholder, or the registered

owner, if other than the homeowner, as provided by this subdivision, may not be exercised more than twice during a 12-month period.

(5) If a homeowner has been given a three-day notice to pay the amount due or to vacate the tenancy on three or more occasions within the preceding 12-month period, no written three-day notice shall be required in the case of a subsequent nonpayment of rent, utility charges, or reasonable incidental service charges.

In that event the management shall give written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, each junior lienholder, and the

registered owner of the mobilehome, if other than the homeowner, as specified in paragraph (b) of Section 798.55, by certified or registered mail return receipt requested within 10 days after notice is sent to the homeowner.

(f) Condemnation of the park.

(g) Change of use of the park or any portion thereof, provided:

(1) The management gives the homeowners at least 15 days' written notice that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use of the mobilehome park.

(2) After all required permits requesting a change of use have been approved by the local governmental board, commission, or body, the management shall

give the homeowners six months' or more written notice of termination of tenancy.

If the change of use requires no local governmental permits, then notice shall be given 12 months or more prior to the management's determination that a change of use will occur. The management in the notice shall disclose and describe in detail the nature of the change of use.

(3) The management gives each proposed homeowner written notice thereof prior to the inception of his or her tenancy that the management is requesting a change of use before local governmental bodies or that a change of use requested has been granted.

(4) The notice requirements for termination of tenancy set forth in Section 798.56 and 798.57 shall be followed if the proposed change actually occurs.

(5) A notice of a proposed change of use given prior to January 1, 1980, which conforms to the requirements in effect at that time shall be valid. The requirements for a notice of a proposed change of use imposed by this subdivision shall be governed by the law in effect at the time the notice was given.

(h) The report required pursuant to subdivisions (b) and (i) of Section 65863.7 of the Government code shall be given to the homeowners or residents at the same time that notice is required pursuant to subdivision (g) of this notice.

§ 798.56a. Notice to management after receipt of notice of termination by legal owner and each junior lienholder; right to sell mobilehome within park

(a) Within 60 days following receipt, or not later than 65 days after the

mailing, of the notice of termination of tenancy for nonpayment, or rent or other charges, the legal owner and each junior lienholder shall notify the management in writing of at least one of the following:

(1) Its offer to sell the obligation secured by the mobilehome to the management for the amount specified in its written offer. In that event, the management shall have 15 days following receipt of the offer to accept or reject the offer in writing. If the offer is rejected, the person or entity shall have 10 days in which to exercise one of the other options contained in this section and shall notify management in writing of its choice.

(2) Its intention to foreclose on its security interest in the mobilehome.

(3) Its request that the management pursue the termination of tenancy against

the homeowner and its offer to reimburse management for the reasonable attorney's fees and court costs incurred by the management in that action.

(b) In the event that the legal owner or junior lienholder exercises any option described in paragraph (2) or (3) of subdivision (a), and has the right to sell the mobilehome within the park to a third party in accordance with this article, that person or entity shall have the right to keep the mobilehome on the site within the mobilehome park until it is resold as long as the person or entity performs all of the following acts:

(a)(A) Satisfies, within the time period specified in subdivision (a), all of the homeowner's responsibilities and liabilities owing to the management for the 90 days preceding the mailing of the notice of termination of tenancy and then

continue to satisfy them as they accrue from the date of the mailing of that notice until the date the mobilehome is resold.

(B) Performance under this paragraph does not cure the default of the homeowner.

(C) For purposes of this paragraph, the "homeowner's responsibilities and liabilities" means all rents, utilities, reasonable maintenance charges of the mobilehome and its premises, and reasonable maintenance of the mobilehome and its premises pursuant to existing park rules and regulations.

(2) Within the time period specified in subdivision (a), commences all repairs and necessary corrective actions so that the mobilehome complies with park rules and regulations in existence at the time the notice of termination of tenancy was

given as well as the health and safety standards specified in Sections 18550, 18552, and 18605 of the Health and Safety Code, and completes these repairs and corrective actions within 90 calendar days of that notice, or before the date the mobilehome is resold, whichever is earlier.

(3) Complies with the requirements of Article 7 (commencing with Section 798.70) as it relates to the transfer of a mobilehome to a third party.

(c) In the event the legal owner or junior lienholder does not respond to the notice provided by management by notifying management in writing of its election pursuant to subdivision (a), or does not satisfy the requirements of subdivision (b), that person or entity shall have no rights to sell the mobilehome within the park to a third party.

(d) In the event the homeowner files for bankruptcy, the periods set forth in this section are tolled until the mobilehome is released from bankruptcy.

(e) Notwithstanding any other provision of law, including, but not limited to, Section 18099.5 of the Health and Safety Code, in the event neither the legal owner nor a junior lienholder, if any, notifies the management of its decision pursuant to subdivision (a) within the period allowed, or performs as agreed within 30 days, the management may either remove the mobilehome from the premises and place it in storage or store it on its site. In this case, notwithstanding any other provision of law, the management shall have a warehouseman's lien in accordance with Section 7209 of the Commercial Code against the mobilehome for the costs of

dismantling and moving, if appropriate, as well as storage, which shall be superior to all other liens, except the lien provided for in Section 18116.1 of the Health and Safety Code, and may enforce the lien pursuant to Section 7210 of the commercial code.

(f) All written notices required by this section shall be sent to the other party by certified or registered mail with return receipt requested.

ARTICLE 7. TRANSFER OF MOBILEHOME OR MOBILEHOME PARK

§ 798.74. Prior approval of purchaser; grounds for withholding; financial information; notice of acceptance or rejection; interview; fee; credit or refund

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park

and that the selling homeowner or his or her agent gives notice of the sale to the management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. In determining whether the purchaser has the financial ability to pay the rent and charges of the park, the management shall not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support.

Upon request of any prospective homeowner who proposes to purchase a mobilehome that will remain in the park, management shall inform that person of the information management will require in order to determine if the person will be acceptable as a homeowner in the park.

Within 15 business days of receiving all of the information requested from the prospective homeowner, the management shall notify the seller and the prospective homeowner, in writing, of either acceptance or rejection of the application, and the reason if rejected. During this 15-day period the prospective homeowner shall comply with the management's request, if any, for a personal interview. If the approval of a prospective homeowner is withheld for any reason other than those stated in this article, the management or owner may be

held liable for all damages proximately resulting therefrom.

(b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee, or a portion thereof, to defray its administrative costs under this section.

Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

No. 91-631

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT CASELLA, et al.,
Petitioners,

vs.

THE CITY OF MORGAN HILL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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CITY OF MORGAN HILL

QUESTION PRESENTED

Whether the state court was correct in ruling that the City of Morgan Hill's Mobilehome Rent Stabilization Ordinance did not constitute a taking under the California Constitution, Article I, Section 19, despite the existence of two federal court of appeal decisions which held that similar ordinances constituted a physical taking under the United States Constitution.

LIST OF PARTIES

The parties to the proceeding below were the Petitioners Robert Casella, Mary Jo Casella, Billy Baxley, Clara Baxley, Donald Wetterstrom, Indianola Wetterstrom, Allan C. Roman, Jackie Roman, collectively a California General Partnership d/b/a Hacienda Valley Mobile Home Estates and Respondent City of Morgan Hill, a Municipal Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 5

California Constitution 5

Morgan Hill Ordinance 5

California Statutes 7

STATEMENT OF THE CASE 8

The State Superior Court Action 8

The State Court Appeal 9

The State Supreme Court Denial 14

The Federal Case 14

DENIAL OF THIS WRIT IS APPROPRIATE. HOWEVER, IF THE WRIT IS GRANTED, THE JUDGMENT BELOW SHOULD BE AFFIRMED 16

I. THE COURT OF APPEAL FULLY CONSIDERED AND CORRECTLY RULED ON CASELLA'S TAKING CLAIM 19

A. THE FEDERAL STANDARD FOR DECIDING TAKINGS CLAIMS IS EMBODIED IN UNITED STATES SUPREME COURT DECISIONAL LAW 21

B. THE *HALL V. CITY OF SANTA BARBARA* CASE DOES NOT REFLECT THE APPLICABLE FEDERAL STANDARD 27

C. THE *HALL* RATIONALE HAS BEEN UNDERMINED BY SUBSEQUENT CASES 30

1. The *FCC* Decision Undermined The *Hall* Panel's Rationale. 30

2. *Pennell* Rejected Arguments From *Hall* That Rent Control Was A Per Se Taking. 31

3. The Connecticut Supreme Court Has Rejected The *Hall* Rationale. 32

4. A Mere Loss Of Money Is Not A Physical Taking. 35

D. THE THIRD CIRCUIT'S DECISION IN *PINEWOOD* IS NOT PERSUASIVE BECAUSE IT FAILED TO CONSIDER BINDING AND RELEVANT AUTHORITIES 38

E. THE *HALL* RATIONALE SHOULD NOT BE EXTENDED 41

F. THE CITY'S RENT STABILIZATION ORDINANCE WAS ENACTED AS A REASONABLE EXERCISE OF THE POLICE POWER TO CONTROL EXCESSIVE RENT INCREASES FOR MOBILEHOME PARK RESIDENTS 47

CONCLUSION 51

TABLE OF AUTHORITIES

Cases

Azul Pacifico v. City of Los Angeles, 740 F. Supp. 772 (C.D. Cal. 1990), *appeal docketed*, No. 90-55853 (9th Cir. 1991) 48, 49, 50

Cardinale v. Louisiana, 394 U.S. 437, (1969) 18

Casella v. City of Morgan Hill, 230 Cal. App. 3d 43, 280 Cal. Rptr. 876 2, 10

Eamiello v. Liberty Mobile Home Sales, 208 Conn. 620, 546 A.2d 805 (1988), *app. dism.*, 489 U.S. 1002 (1989) 32, 33, 34, 35, 39, 40

FCC v. Florida Power Corp., 480 U.S. 245 (1987) 30, 31, 32, 33, 39

Fisher v. City of Berkeley, 471 U.S. 1124 (1985) 29

Fresh Pond Shopping Center v. Callahan, 464 U.S. 875 (1983) 29, 33

Hall v. City of Santa Barbara,
833 F.2d 1270 (9th Cir. 1986),
cert. den., 485 U.S. 5940 (1988)
8, 10, 13, 21, 27, 28, 29,
33, 38, 41, 42, 43, 44, 46, 50, 51

Illinois v. Gates,
462 U.S. 213 (1983),
reh'g denied; 463 U.S. 1237
17, 19

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982)
11, 23, 24, 25, 25, 28,
29, 31, 33, 36,37, 38, 39, 40

Nash v. City of Santa Monica,
470 U.S. 1046 (1985)
29

Penn Central Transportation Co. v. New York City,
438 U.S. 104 (1978)
22, 27

Pennell v. City of San Jose,
485 U.S. 1 (1988)
31, 51

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922)
21

People v. Bradley,
1 Cal.3d 80, (1969)
19

Pinewood Estates of Michigan v. Barnegat Township,
898 F.2d 347 (1990)
21, 38, 39, 40

Sierra Lakes Reserve v. City of Rocklin,
938 F.2d 951 (9th Cir. 1991)
41

Tacon v. State of Arizona,
410 U.S. 3521 (1973)
18

United States v. Sperry Corp.,
493 U.S. 52 (1989)
34, 37, 40

Webb v. Webb,
451 U.S. 493 (1981)
5, 18, 19

Yee v. City of Escondido,
224 Cal .App. 3d 1349,
cert. granted, (No. 90-1947)
11

Constitutional Provisions, Statutes and Rules

28 U.S.C. Section 1257 3

California Constitution,
Article I, Sec. 19 5

California Mobilehome Residency Law (Cal. Civ. Code, §§ 798-799.49)
7, 43, 45

Morgan Hill Ordinance Mobilehome Rent Stabilization Ordinance 43, 47

Texts and Miscellaneous Material

Manheim "Tenant Eviction Protection and the Takings Clause" 1989 Wisconsin Law Review 925 at 955-956 n.179 46

9 Witkin, *California Procedure*, "Appeal", Section 781 20

No. 91-631

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Morgan Hill ("City") respectfully requests that this

Court deny Petitioners, Robert Casella, et al.'s ("Casella") Petition for Writ of Certiorari seeking review of the Sixth Appellate District California Court of Appeal decision in this case. In the alternative, City respectfully requests that the Court either summarily affirm the judgment entered by the state court that the challenged vacancy control provision of the Mobilehome Rent Stabilization Ordinance does not constitute a taking under the California Constitution, or summarily dismiss for want of a substantial federal question.

OPINIONS BELOW

On November 27, 1989, the Santa Clara County Superior Court, trial court for the State of California, sustained City's demurrer to Casella's complaint and Granted Plaintiffs 30 days leave to amend their complaint. Casella elected not to

amend and moved for Entry of Dismissal of the Complaint which was granted and entered on February 15, 1990. A copy of this order is included as Appendix C to the Petition for Writ of Certiorari.

On May 10, 1991, the Sixth Appellate District of the California Court of Appeal issued its opinion affirming the dismissal of the complaint. The opinion is reported at 230 Cal. App. 3d 43, 280 Cal. Rptr. 876. A copy of the opinion is included as Appendix A to the Petition for Writ of Certiorari.

On July 17, 1991, the California Supreme Court issued an order denying Casella's Petition for Review. A copy of the Order is included as Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

Casella has invoked the Court's jurisdiction under 28 U.S.C. Section 1257

apparently under the provision which allows review "where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States."

The complaint filed by Casella in the state trial court did not allege a violation of the United States Constitution. Casella declined the offered opportunity to amend the complaint to include additional allegations or claims. The state appellate court decision affirming dismissal of the complaint is based on California Constitutional Law. Because Casella failed to properly raise federal constitutional issues in the state court at the trial level, Casella should be barred from raising them now. Petitioners cannot show that the federal claim was

adequately presented in the state system and hence the Supreme Court does not have jurisdiction. (*See Webb v. Webb*, 451 U.S. 493 (1981).)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED[1]

California Constitution

The California Constitution, Article I, Sec. 19, provides:

> Private property may be taken or damaged for public use only when just compensation... has first been paid to, or into court for, the owner.

Morgan Hill Ordinance

The Mobilehome Rent Stabilization

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[1]Although Petitioners have set forth the Fifth Amendment to the United States Constitution as one of the Constitutional provisions involved, the state court complaint did not allege a federal constitutional violation, nor was this issue specifically addressed at the court of appeal level.

Ordinance challenged in this lawsuit regulated the amounts which could be charged for rental of the space upon which mobilehomes are placed. That ordinance further provided that upon transfer of ownership of a mobilehome which was to remain in the mobilehome park, the space rent could only be increased by a one-time administrative fee of twenty-five dollars ($25.00). This provision is described herein as "vacancy control."

On October 4, 1989, Ordinance No. 940 was enacted by City which eliminated any restrictions on the amount which could initially be charged to a purchaser of a mobilehome within the mobilehome park. Enactment of this ordinance mooted petitioners' claims for injunctive relief against further enforcement of the vacancy control provision.

California Statutes

The California Mobilehome Residency Law (Cal. Civ. Code, §§ 798-799.49) governs many aspects of the relationship between mobilehome park owners and the mobilehome owners residing on the rented spaces within the park. The legislative justification for the unique protections provided mobilehome owners is set forth in the statute. Protections include restrictions on terminating a space tenancy, and restrictions preventing a park owner from interfering with or preventing the sale of a homeowner's mobilehome to a new purchaser as long as the prospective buyer has the financial ability to pay the space rent and does not have a prior history of non-compliance with mobilehome park rules and regulations.

STATEMENT OF THE CASE

The State Superior Court Action

On August 30, 1989, Casella filed a complaint in Santa Clara County Superior Court challenging the vacancy control provision of the City of Morgan Hill's Mobilehome Rent Stabilization Ordinance as a violation of the California Constitution Article I, Section 19. Casella relied primarily on the case of *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. den.*, 485 U.S. 5940 (1988), claiming that a rent control ordinance containing a vacancy control provision effectuated a physical taking of the plaintiff's property in violation of the Fifth Amendment to the United States Constitution. Casella's complaint sought damages in the amount of $5,000,000, attorney's fees and costs.

On October 17, 1989, the City of

Morgan Hill filed a demurrer to the complaint on the grounds that Casella had failed to state sufficient facts to state a cause of action.

On November 27, 1989, after hearing on the matter, the superior court granted City's demurrer and gave Casella thirty days leave to amend the complaint.

Casella elected not to amend the complaint thereby voluntarily giving up the opportunity to amend to include an allegation that the ordinance violated the United States Constitution. A dismissal was entered on February 15, 1990.

The State Court Appeal

Casella filed a timely notice of appeal of the superior court dismissal to the Sixth Appellate District Court of Appeals of the State of California. Although Casella argued in its appellate court briefs that the ordinance violated

both the California and United States Constitutions, City argued in its brief that the complaint did not allege a cause of action for taking under the United States Constitution.

On May 10, 1991, in a decision reported as *Casella v. City of Morgan Hill*, 230 Cal. App. 3d 43, 280 Cal. Rptr. 876, the court of appeals affirmed the trial court's dismissal of the case. The court concluded that the pleadings failed to state facts sufficient to constitute a taking and rejected Casella's argument that a contrary result was required by the decision of the Ninth Circuit Court of Appeals in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. den.*, 485 U.S. 5940 (1988). (Appendix A to Petition, pages A-1 - A-2). The state appellate court held that an economic regulation such as the challenged rent

control measure could not metamorphose into a physical occupation such as that involved in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and similar cases. The court noted that its decision was consistent with *Yee v. City of Escondido*,[2] 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990).

The state appellate court ruled that in the absence of allegations that the challenged ordinance prevented a fair and reasonable return on the owners' investment or that owners had been denied economically viable use of their land, the court could not find, under any construction of the facts, that a claim for taking without just compensation had been plead.

It is important to note that the

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[2]Yee v. City of Escondido has been accepted for review by this Court and bears Supreme Court Docket Number 90-1947.

state appellate ruling was based, at least in part, on the unique procedural history of this case. The court stated:

> Where the trial court sustains a demurrer with leave to amend but the plaintiff elects not to amend, there is a presumption that the plaintiff has stated as strong a case as he or she can. In such instances, in determining whether the trial court has abused its discretion, the appellate court must resolve all ambiguities and uncertainties raised by the demurrer against the plaintiff; if the complaint is objectionable on any ground raised by the demurrer the judgment of dismissal must be affirmed.
>
> (Appendix A to Petition for

Writ pages A-10 - A-11.)

The state appellate court did not purport to overrule the Ninth Circuit's decision in *Hall*, it simply declined to accept the rationale of *Hall* in applying California Constitutional Law to the allegations of the complaint. There is no indication that the court intended to adjudicate Casella's claims under the United States Constitution. Although the court did set forth the terms of the Fifth Amendment to the United States Constitution at page 13 of the Opinion, the terms are juxtaposed next to a statement about the similarity between the Fifth Amendment and Article I, Section 19 of the California Constitution.

In their Petition for Writ of Certiorari Casella has failed to point to any other language in the Opinion which supports the contention that the state

court was actually ruling on federal constitutional grounds. It is submitted that mere citation to the Fifth Amendment does not indicate that the state court adjudicated federal constitutional issues when only state constitutional issues were properly before the court based on the complaint filed by Casella.

The State Supreme Court Denial

On July 17, 1991, the California Supreme Court denied Casella's Petition for Review and also denied Casella's request for an order directing de-publication of the opinion. (Appendix B to Petition For Writ.)

The Federal Case

The federal case is not the subject of this Petition for Writ of Certiorari. Casella's recitation of the procedural history and arguments presented therein is

not germane to this matter.[3] City submits that Casella's request that the federal district court be ordered to take jurisdiction over the federal case is not properly raised in this petition for Writ of Certiorari for review of the state court judgment. If Casella objects to the decision of the federal district court, their recourse lies through appeal to the Ninth Circuit Court of Appeal, not through collateral insinuation into this Petition for Writ of Certiorari.

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[3]Casella's argument that "The Federal Claim Did Not Even Exist At The Time The State Court Purported To Dispose Of It" (Petition for Writ page 28-31) undercuts their assertion, necessary to this Petition, that the state court ruled on the federal constitutional issues. The argument that the federal constitutional issues were unripe is inconsistent with Casella's assertions that they properly raised these claims in the state court action.

DENIAL OF THIS WRIT IS APPROPRIATE. HOWEVER, IF THE WRIT IS GRANTED, THE JUDGMENT BELOW SHOULD BE AFFIRMED

City urges that this Petition For A Writ Of Certiorari be denied, or in the alternative, the judgment below be summarily affirmed. In their questions presented section, Casella seriously misstates the issues which are purportedly before the court. Question one states in part "Was it error for the state appellate court to disregard the (federal court) rulings and hold that there was no taking under the fifth and fourteenth amendments?" Casella's state court complaint only alleged a violation of the California Constitution and did not allege a violation of the United States Constitution. The state appellate court opinion does not purport to rule on

federal constitutional issues. Casella's efforts to seek United States Supreme Court Review of the validity of the state appellate court's holdings with regard to federal law when no such holdings are present in the published opinion should be summarily denied as entirely lacking any merit. Where, as here, it is not clear from the record that a federal question has been both raised and decided in the state court, jurisdiction of the Supreme Court is not warranted. *Illinois v. Gates*, 462 U.S. 213 (1983), *reh'g denied*; 463 U.S. 1237.

Casella lists as question presented number two whether the ordinance constituted a violation of substantive due process. This issue, based on the United States Constitution, was first raised by Casella in their appellate court reply brief to which City did not have an

opportunity to respond. City submits that this issue, not properly raised below, is not a proper issue for this Court's determination. *Webb v. Webb*, 457 U.S. 493 (1981). Casella's question number three relating to the ripeness of the federal claim is an issue which was not presented below at any stage of the state court proceedings. Because this Court has traditionally refused to decide federal constitutional issues raised for the first time on review of state court decisions (*See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. State of Arizona*, 410 U.S. 3521 (1973); summary denial of this petition is warranted.

The California state court judgment which is the subject of this petition did not decide a federal question in a way that conflicts with the decision of a United States Court of Appeals because the

decision was based on the California Constitution. Casella has failed to properly show from the record that the federal question was both properly raised and decided in the state court actions. For this reason, review is not warranted pursuant to Supreme Court Rule 10(b). (*See, e.g. Illinois v. Gates*, 462 U.S. 213 (1983), *reh'g denied*, 463 U.S. 1237; *Webb v. Webb*, 451 U.S. 493 (1981).)

I. THE COURT OF APPEAL FULLY CONSIDERED AND CORRECTLY RULED ON CASELLA'S TAKING CLAIM

Contrary to Casella's assertion that state courts are bound to follow federal law in determining federal issues, (see Petition for Writ pages 34-35) decisions of lower federal courts are not binding on the courts of California, even on federal questions (*People v. Bradley* 1 Cal.3d 80, 86 (1969).) The decisions of lower

federal courts, including the Ninth Circuit Court of Appeals, while persuasive on matters of federal law are not binding on California courts. They do have the same value as decisions of other state courts, i.e. well-considered decisions are persuasive. (*See* 9 Witkin, *California Procedure*, "Appeal", Section 781.)

Casella contends that the state appeals court "erred in determining federal rights under the Fifth and Fourteenth Amendments in contravention of the entire published federal case law on point." (Petition for Writ page 34.) Assuming for purposes of argument that the state court did determine the federal constitutional issues involved, City submits that the state appellate decision is based on a well-reasoned analysis of existing federal takings law as set forth in the Opinion pages 13-41 of Exhibit A to

Petition. Failure to follow the Ninth Circuit decision in *Hall v. City of Santa Barbara*, or the Third Circuit decision in *Pinewood Estates of Michigan v. Barnegat Township*, 898 F.2d 347 (1990) is not a flagrant disregard of federal law on the subject.

A. THE FEDERAL STANDARD FOR DECIDING TAKINGS CLAIMS IS EMBODIED IN UNITED STATES SUPREME COURT DECISIONAL LAW

The Fifth Amendment to the United States Constitution, applicable to the states through the due process clause of the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. Initially, courts construed the just compensation clause to apply only when the state physically occupied private property. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Oliver

Wendell Holmes expanded the understanding of what constituted a taking by declaring that a regulation which goes too far will be recognized as a taking. However, the courts use a significantly different analysis when the allegations of the complaint are based on a regulatory rather than a physical taking.

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), is an example of the regulatory line of cases where the value or usefulness of plaintiff's property is diminished by governmental regulatory action although there is no physical occupation of the property. Under a regulatory takings analysis a multi-factor balancing approach is employed rather than a set formula. The economic impact of the regulation and especially the extent to which the regulation interferes with the reasonable

investment backed expectations of the owner, holds particular significance. The character of the governmental action is also weighed in the balance.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) is an example of the physical occupation line of cases where the government physically intrudes upon plaintiff's property. In the case of an actual physical occupation, a taking will be found "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owners." (*Loretto, Id.* at 434-435). The *Loretto* opinion emphasized that its holding was "very narrow" (*Id.* at 441) and indicated that it would not impair the government's power to regulate landlord-tenant relationships (*Id.* at 440). The Court stated "so long as [government] regulations do not require

the landlord to suffer the physical occupation of a portion of his buildings by a third party, they will be analyzed under the multi-factor inquiry generally applicable to non-possessory governmental activity." (*Ibid.* at 440.)

Justice Blackmun authored a dissenting opinion in *Loretto* with Justices Brennan and White joining. Justice Blackmun analyzed past Supreme Court cases and found no basis in the law for applying a different test dependent on whether or not a permanent physical occupation was alleged. Justice Blackmun wrote:

> In sum, history teaches that takings claims are properly evaluated under a multi-factor balancing test. By directing that all "permanent physical occupations" automatically are

> compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owners." ante, at 434-435, the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its per se rule.
> (*Loretto*, 458 at 451)

As Justice Blackmun foretold, Petitioners herein have attempted to shoehorn insubstantial takings claims into the set formula for a physical taking (*Ibid.*) Based on the Majority's discussion in *Loretto*, responding to the dissenters' concerns, City submits that the per se taking standard is only appropriate where there has been an actual physical invasion of the property by a

third person of the sort which is visible and/or tangible. The Court, in explaining the distinctions between a permanent physical occupation and other takings, stated "Whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." (*Loretto*, 458 at 437.)

The type of physical occupation alleged by Casella in their complaint does not fit within the narrow holding of *Loretto*. The alleged physical occupation is not a readily discernable placement of a fixed structure on the owner's property by a third party. The physical occupation alleged here is more a metaphysical economic analysis of the impact of a successor tenant. Because the taking

alleged here cannot fit within the very narrow holding of *Loretto*, Supreme Court precedent requires that the multi-factored balancing test described in *Penn Central*, 438 U.S. 104 (1978), be applied.

B. THE *HALL V. CITY OF SANTA BARBARA* CASE DOES NOT REFLECT THE APPLICABLE FEDERAL STANDARD

The Ninth Circuit Court of Appeals in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (1986), reviewed United States Supreme Court precedent and, based on an interpretation thereof, determined that if the allegations of the complaint were proven true, the Santa Barbara Ordinance, in effect, acted to cause a physical occupation of the mobilehome park owner's property. The *Hall* court viewed the effect of the ordinance as a permanent physical occupation. The traditional regulatory takings multi-factored

balancing test was not applied, and a per se cause of action for taking was found to be viable. The federal standard purportedly applied in *Hall* was that handed down by the Supreme Court in *Loretto* and cases cited therein.

The *Hall* opinion acknowledges that there are no absolute rules in determining whether a taking has occurred. It was observed that the Supreme Court itself had been unwilling to provide any hard and fast rules to determine issues in this sensitive area. (*Hall*, 833 F.2d at 1278.) In the face of this, Casella maintains that *Hall* provides the definitive ruling on this issue and that any city rent control ordinance which is similar in effect to the Santa Barbara Ordinance qualifies as a permanent physical occupation for which compensation must be paid.

The dissenting opinion in *Hall* from the denial of an en banc hearing states "The ordinance at issue is in all material respects identical to three rent regulation challenges that the Supreme Court dismissed in recent years as lacking a substantial federal question. (*Fisher v. City of Berkeley*, 471 U.S. 1124 (1985); *Nash v. City of Santa Monica*, 470 U.S. 1046 (1985); and *Fresh Pond Shopping Center v. Callahan*, 464 U.S. 875 (1983).) The panel decision is thus contrary to controlling authority." (*Hall*, dissent 833 F.2d at 1281.) The dissenting opinion criticized the reasoning in *Hall* observing that *Loretto* made clear the distinction between permanent physical occupations and regulations impairing use or even causing a temporary injury to the property. The dissent states: "The hallmark of the physical invasion described in *Loretto* is

actual appropriation of the land itself through physical contact ... " (*Id.* at 1283.) The dissent argues that the *Hall* analysis that economic regulation can shade into physical invasion is antithetical to the reasoning of *Loretto*.

C. THE *HALL* RATIONALE HAS BEEN UNDERMINED BY SUBSEQUENT CASES

1. The *FCC* Decision Undermined The *Hall* Panel's Rationale.

Subsequent to the *Hall* panel decision, the Supreme Court decided *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). In *FCC*, a public utility argued that a federal statute, which authorized the FCC to determine the rate which it could charge a cable TV system for the use of its poles, constituted a "taking." The Court disagreed and pointed out that the statute did not require the utility to rent its poles but merely regulated the

rents it charged once it had decided to rent (*FCC*, 480 U.S. at 251). After pointing out that "statutes regulating the economic relations of landlords and tenants are not per se takings" and citing the *Fresh Pond* rent control decision, the Court dismissed the contention that the rent regulation was a "taking". (*Id.* at 252.)

2. *Pennell* Rejected Arguments From *Hall* That Rent Control Was A Per Se Taking.

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court upheld San Jose's rent control ordinance, and refused to declare rent control a per se taking. Chief Justice Rehnquist wrote:

> We stated in *Loretto v. Teleprompter Manhattan CATV Corp.*, [citation] that we 'have broad power to regulate housing

conditions in general and the landlord/tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.' [citations] And in *FCC v. Florida Power Corp.*, [citation] we stated that 'statutes regulating the economic relations of landlords and tenants are not per se takings. [citations.]' (485 U.S. at 14 n.6.)

3. The Connecticut Supreme Court Has Rejected the *Hall* Rationale.

In *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 546 A.2d 805 (1988), *app. dism.*, 489 U.S. 1002 (1989), the state court held that the modification of a lessor's common law right to absolute control over the lease term and identity

of the lessee effectuated by the challenged mobilehome rent control ordinance was not sufficiently analogous to a physical occupation to constitute a taking. The Court examined the *Hall* rationale and rejected its reasoning. The Connecticut Court also determined that there were significant differences between the Connecticut mobilehome statute and the Santa Barbara ordinance. The Court reviewed *Loretto*, *FCC* and *Fresh Pond*, and then distinguished *Loretto*, pointing out that a mobilehome owner's right to occupy a mobilehome space was originally obtained "consensually" indicating that in entering into such a lease the park owner has transferred his "possessory interest" in the land to the homeowner in return for rents. (*Eamiello*, 546 A.2d at 818.)

The Connecticut Court concluded, based on evidence presented that the

ordinance "protects tenants at mobilehome parks from being forced to sell to park owners at a substantial loss and, as a consequence, benefits many low income people who cannot otherwise afford to purchase a more expensive home." (*Ibid.*)

While recognizing that the state statute which prevented rent increases on transfer might result in the homeowner receiving a greater price for his home than he would otherwise obtain because the right to continue occupancy of the site is transferrable to the purchaser, the court nevertheless upheld the statute, concluding that since the state has created the site value through regulatory scarcity such as zoning restrictions, it could constitutionally repose any sales premium in the homeowner rather than the park owner. (*Id.* at 820.)

The court concluded:

> In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, §21-79 strikes a reasonably fair balance between the economic interests of mobile home tenants and those of mobile home park operators. (*Ibid.*)

4. A Mere Loss of Money Is Not A Physical Taking.

In *United States v. Sperry Corp.*, 493 U.S. 52 (1989), this Court held that a statute which required American claimants to pay the United States a

percentage of the monetary awards made by the Iran-United States Claims Tribunal was neither a "taking" nor a violation of the due process clause. This Court's decision reversed the Federal Circuit Court of Appeals which had held that the payment was a "permanent physical occupation" of property and therefore a "per se taking" under *Loretto*. This court explained:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attached to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the

> deduction in this case was physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.
>
> (*Sperry*, 107 L. Ed 2d at 303 n. 9.)

In the case before this Court, there is no physical property that is being occupied due to the ordinance. This distinction makes the case dissimilar to *Loretto*. As in *Sperry*, the impact of the ordinance is limited to the park owner's wallet, in that in the absence of the ordinance, the park owner might have been able to obtain a higher profit.

Since *Sperry* indicates that mere economic loss is not sufficient to constitute a "physical taking", City

submits that the *Hall* panel's decision lacks persuasive effect.

D. THE THIRD CIRCUIT'S DECISION IN *PINEWOOD* IS NOT PERSUASIVE BECAUSE IT FAILED TO CONSIDER BINDING AND RELEVANT AUTHORITIES

On March 7, 1990, the Third Circuit Court of Appeals issued its decision in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3rd Cir. 1990). In that case, the park owner sued in federal court alleging that the rent leveling ordinance of the town was a taking of property because it prohibited the park owner from increasing rents when a mobilehome owner transferred his home to a new homeowner. A Motion to Dismiss was granted by the district court on the basis that the ordinance was a constitutional regulatory ordinance (*Id.* 898 at 350).

On appeal, a Third Circuit panel

reversed, holding that to the extent that the ordinance granted the homeowners a transferable possessory interest in the park owners land, it constituted a "physical taking" under *Loretto*. (*Id.* at 353-354). The fact that the ordinance provided the park owners with a constitutionally adequate rent for the occupancy of the space itself was held not to be adequate in light of the effects of the vacancy control provision.

The *Pinewood* Court apparently never considered that, unlike *Loretto*, a mobilehome owner's right to occupy a mobilehome space is originally obtained "consensually" (*FCC*, 480 U.S. 352); that a park owner transfers his "possessory interest" in his land to the mobilehome owner in return for rents (*Eamiello*, 546 A.2d at 818), and that since the state has created the site value through

regulatory scarcity, it could constitutionally repose any sales premium in the homeowner rather than the park owner. (*Id.* at 820).

The court failed to recognize that the only "property interest" of the park owner which was frustrated by the ordinance was the owner's desire for higher profits and that such an interest is not tantamount to a physical taking. (*See, United States v. Sperry Corp.*, 107 L. Ed 2d 290 at 303 n.9 (1989).)

These flaws in the *Pinewood* Court's conceptual analysis are underscored by the following passage: "Furthermore, if the rather minor intrusion in *Loretto* was deemed a physical invasion then the gross intrusion here must be so classified." (*Pinewood*, 898 F.2d at 353.) It is submitted that the court confused the legal distinction between a regulatory

taking and a physical occupation. Without realizing, or admitting that it was doing so, the court emphasized the amount of harm from the governmental action as the basis for its classification as a physical rather than a regulatory taking.

E. THE *HALL* RATIONALE SHOULD NOT BE EXTENDED

Criticism of the *Hall* decision has been registered by federal district and appellate courts, state courts and commentators. In a concurring opinion in *Sierra Lakes Reserve v. City of Rocklin*, 938 F.2d 951 (9th Cir. 1991), Judge Goodwin succinctly writes:

> Today we hold that the Rocklin rent control ordinance, as applied, results in a physical taking of private property. We reach this result because the law of the circuit is found in

Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Circ. 1987) *cert. den.*, 485 U.S. 940 (1988).

I concur under the compulsion of precedent, but for the record I want to note that I have not forgotten the difference between the physical and the metaphysical. *Hall* reached a commendable legislative result by calling a regulatory ordinance a physical taking. I am in somewhat the same position as I found myself upon first reading *Roe v. Wade*, 410 U.S. 113 (1973), applauding the result but disturbed by the method. Nonetheless, *stare decisis* is a proven policy, and I concur. (938 F.2d at 959.)

The Morgan Hill and Santa Barbara

ordinances are quite different, especially in regard to the creation of what Casella has identified as "secure tenure". A key provision in *Hall* was that the ordinance required mobilehome operators to offer leases of unlimited duration (*Hall*, 833 F.2d at 1273). In a transparent attempt to qualify under *Hall*, Casella alleged that the rent stabilization ordinance grants tenants the right to physically permanently occupy and use the real property of plaintiff. In fact, the language of the City's ordinance lends no support to these allegations. Far from requiring a perpetual lease, the City's ordinance provides an exemption from the rent control ordinance where the parties have entered into a lease.

The state trial court properly found that the *Hall* decision should not be extended beyond its facts and that the

lack of the key allegations relating to the imposition of a requirement of long-term leases was fatal to stating a claim upon which relief could be granted. The City's ordinance standing alone does not "take" any property right held by Casella. The ordinance merely serves to reduce the landlord's income stream, and thus is no different in legal effect from any police power regulation that has the incidental effect of reducing property values.

Unlike the challenged ordinance in *Hall*, the City's ordinance does not require the landlord to give tenants an indefinite lease terminable only for cause. The "secure tenure" which Casella claims is afforded by the operation of the City's ordinance is actually attributable to the California Mobilehome Residency Law, California Civil Code Section 798-799.49. That law limits a mobilehome park

landlord's right to terminate a tenancy and prohibits a landlord from requiring removal of a mobilehome upon sale to a third party. As long as the tenant can afford the rent and doesn't do anything to warrant eviction for cause, his tenancy is secure under State Law. The City's ordinance merely regulates the price to be paid for the rent.

The State Mobilehome Residency Law was enacted to prevent and rectify what were considered to be widespread abuses of the park owners' monopoly status. The statutory right of a mobilehome owner to transfer the leasehold interest to a third party was deemed necessary to avoid the situation where a park owner could require the removal of the mobilehome upon sale, thereby depleting the mobilehome of much of its value by requiring the expenditure of funds to move the coach. At least part

of the "extra" value which mobilehome owners realize upon the sale of their mobile homes when sold in place is attributable to the fact that moving expenses, which can be extremely costly, need not be incurred. There is also a scarcity of available sites for mobile-homes. (See Manheim "Tenant Eviction Protection and the Takings Clause" 1989 Wisconsin Law Review 925 at 955-956 n.179).

The specific facts involved in *Hall*, specifically that the ordinance itself gave tenants the right to a long-term lease, allowed the Ninth Circuit Court of Appeal to more easily bridge the conceptual gap between a regulatory and a physical taking. City's ordinance does not contain such a requirement. It is therefore urged that it is appropriately categorized as a regulatory action for

takings analysis.

F. THE CITY'S RENT STABILIZATION ORDINANCE WAS ENACTED AS A REASONABLE EXERCISE OF THE POLICE POWER TO CONTROL EXCESSIVE RENT INCREASES FOR MOBILEHOME PARK RESIDENTS

Casella's argument that the City's rent ordinance is violative of substantive due process because it allegedly neither substantially advances or rationally relates to a legitimate governmental purpose has no merit. Again it must be pointed out that this new argument based on the Fourteenth Amendment to the United States Constitution was not stated in the complaint, nor was it raised until the Reply Brief stage at the appellate court level.

By enacting the rent stabilization legislation at issue, the City Council sought to remedy an inequitable market

situation caused by the scarcity of mobilehomes and the unique costs associated with moving a mobilehome. The ordinance sought to protect mobilehome owners from unreasonable space rental increases and thereby protect the mobilehome owner's substantial investment in the coach, while also providing park owners with a just and reasonable return on the park owners' investments.

In *Azul Pacifico v. City of Los Angeles*, 740 F. Supp. 772 (C.D. Cal. 1990), *appeal docketed*, No. 90-55853 (9th Cir. 1991), the district court clearly felt that there was a legitimate state interest in the City of Los Angeles enacting the Rent Stabilization Ordinance ("RSO") including the "vacancy control" provisions. (*Azul Pacifico*, 740 F. Supp. at 780.) The court stated:

Based on testimony from mobile-

> home tenants, the City found that, without vacancy control, it would be virtually impossible for tenants to sell their homes on the pad because landlords could raise the rent to a level that prospective buyers could not afford. (*Ibid.*)

The Court further pointed out that "the Supreme Court has long held that protection of consumer welfare is a legitimate and rational goal of price control" (*Ibid.*), and that rent control has long been held constitutional as "a legitimate exercise of the state's police power" (*Id.* at 781). The Court concluded that "the mobilehome market is an example of a monopoly, which is a market <u>failure</u>, rather than a market, and is a prime candidate for government regulation." (*Ibid.*)

Nevertheless, despite an analysis which seemed to reject the rationale of *Hall* at virtually every turn, the court in *Azul Pacifico* felt itself bound by the controlling *Hall* decision to find a "taking" had occurred. The courts have regularly found rent control legislation to be a reasonable and legitimate means of addressing problems related to scarcity in rental property and the high rents resulting from inequities in bargaining power. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, (1988) upholding rent control ordinance which required consideration of hardship to low income tenants of rent increase).

As pointed out in the *Hall* dissent "significant doubt as to whether a legislative body's goals are in fact achieved is not sufficient to warrant striking down an ordinance ... The

Judiciary does not have the power to sit as a 'superlegislature' second-guessing the wholly economic regulations of State and local governments." (*Hall*, 833 F2d at 1284 [citations omitted], Shroeder, J. dissenting from the denial of en banc hearing. Nelson, J. and Norris, J. concurring.)

It is urged that the City's rent ordinance passes constitutional muster because the Council reasonably concluded that enactment of the ordinance would promote the legitimate State interest of controlling excessive rental prices for the predominately fixed-income residents of the City's mobilehome parks.

CONCLUSION

For the foregoing reasons, City requests that this Court deny the petition for review, or in the alternative, that

the Court grant certiorari and summarily affirm the state court decision. City vigorously opposes Casella's "third alternative" that this Court order the federal district court to take jurisdiction over Casella's claims. This is a Petition for Review of the State Appellate Court decision and the federal district court proceedings are not properly before this Court at this time.

Respectfully submitted,

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DATED: November 6, 1991.